
MEMORANDUM

TO: British Columbia Association of School Business Officials

FROM: Koffman Kalef LLP

RE: Dispute Resolution Mechanisms – Negotiation, Mediation and Arbitration

DATE: November 26, 2025

1. Introduction

There is a wide range of mechanisms available to settle disputes. This paper will discuss some basic information about the dispute resolution mechanisms that are most likely to be used in British Columbia.

2. Negotiation

2.1 *What is Negotiation?*

Negotiation has been defined as any form of direct or indirect communication whereby parties who have opposing interests discuss the form of any joint action which they might take to manage and ultimately resolve the dispute between them. Negotiations may be used to resolve an already-existing problem or to lay the groundwork for a future relationship between two or more parties.

Negotiation has also been characterized as the “preeminent mode of dispute resolution”, which is hardly surprising given its presence in virtually all aspects of everyday life, whether at the individual, institutional, national or global levels. Each negotiation is unique, differing from one another in terms of subject matter, the number of participants and the process used.

Given the presence of negotiation in daily life, it is not surprising to find that negotiation can also be applied within the context of other dispute resolution processes, such as mediation and litigation settlement conferences

2.2 *Characteristics of a Negotiation*

Negotiation is:

- **Voluntary:** No party is forced to participate in a negotiation. The parties are free to accept or reject the outcome of negotiations and can withdraw at any point during the process. Parties may participate directly in the negotiations or they may choose to be represented by someone else, such as a lawyer or other professional.

- **Non-adjudicative:** Negotiation involves only the parties. The outcome of a negotiation is reached by the parties together without recourse to a third-party neutral.
- **Informal:** There are no prescribed rules in negotiation. The parties are free to adopt whatever rules they choose, if any. Generally they will agree on issues such as the subject matter, timing and location of negotiations. Further matters such as confidentiality, the number of negotiating sessions the parties commit to, and which documents may be used, can also be addressed.
- **Flexible:** The scope of a negotiation depends on the choice of the parties. The parties can determine not only the topic or the topics that will be the subject of the negotiations, but also whether they will adopt a positional-based bargaining approach or an interest-based approach.

2.3 *Advantages of Negotiation*

- In procedural terms, negotiation is probably the most flexible form of dispute resolution as it involves only those parties with an interest in the matter and their representatives, if any. The parties are free to shape the negotiations in accordance with their own needs, for example, setting the agenda, selecting the forum and identifying the participants. By ensuring that all those who have an interest in the dispute have been consulted regarding their willingness to participate and that adequate safeguards exist to prevent inequities in the bargaining process (i.e., an imbalance in power between the parties), the chances of reaching an agreement satisfactory to all are enhanced.
- Like any method of dispute resolution, negotiation cannot guarantee that a party will be successful. However, many commentators feel that negotiations have a greater possibility of a successful outcome when the parties adopt an interest-based approach as opposed to a positional-based approach. By focusing on their mutual needs and interests and the use of mechanisms such as objective standards, there is a greater chance of reaching an agreement that meets the needs of the parties. This is sometimes referred to as a “win-win” approach.
- Negotiation is a voluntary process. No one is required to participate in negotiations should they not wish to do so.
- There is no need for recourse to a third-party neutral. This is important when none of the parties wants to involve outside parties in the process, e.g., the matter to be discussed or the dispute to be resolved may be highly sensitive in nature.
- Unlike the outcomes of certain adjudicative processes, e.g., the courts, the outcome of a negotiation only binds those parties who were involved in the negotiation. The agreement must not, of course, be contrary to Canadian law (e.g., an agreement to commit a crime would be illegal and thus void for public policy reasons).
- Assuming that the parties are negotiating in good faith, negotiation will provide the parties with the opportunity to design an agreement which reflects their interests.
- Negotiations may preserve and in some cases even enhance the relationship between the parties once an agreement has been reached between them.

- Opting for negotiation instead of litigation may be less expensive for the parties and may reduce delays.

2.4 *Disadvantages of Negotiation*

- A particular negotiation may have a successful outcome. However, parties may be of unequal power and the weaker party(ies) may be placed at a disadvantage. Where a party with an interest in the matter in dispute is excluded or inadequately represented in the negotiations, the agreement's value is diminished, thereby making it subject to future challenge. In the absence of safeguards in the negotiating process, the agreement could be viewed by a participant or others outside the process as being inequitable, even though the substance of the agreement may be beyond reproach.
- A successful negotiation requires each party to have a clear understanding of its negotiating mandate. If uncertainty exists regarding the limits of a party's negotiating authority, the party will not be able to participate effectively in the bargaining process.
- The absence of a neutral third party can result in parties being unable to reach agreement as they be may be incapable of defining the issues at stake, let alone making any progress towards a solution.
- The absence of a neutral third party may encourage one party to attempt to take advantage of the other.
- No party can be compelled to continue negotiating. Anyone who chooses to terminate negotiations may do so at any time in the process, notwithstanding the time, effort and money that may have been invested by the other party or parties.
- Some issues or questions are simply not amenable to negotiation. There will be virtually no chance of an agreement where the parties are divided by opposing ideologies or beliefs which leave little or no room for mutual concessions and there is no willingness to make any such concessions.
- The negotiation process cannot guarantee the good faith or trustworthiness of any of the parties.
- Negotiation may be used as a stalling tactic to prevent another party from asserting its rights (e.g., through litigation or arbitration)

3. *Mediation*

3.1 *What is Mediation?*

Simply put, mediation is negotiation between disputing parties, assisted by a neutral party. While the mediator is not empowered to impose a settlement, the mediator's presence alters the dynamics of the negotiation and often helps shape the final settlement. The Canadian Bar Association defines mediation as "the intervention into a dispute or negotiation by an acceptable, impartial and neutral

third party who has no decision making power, to assist disputing parties in voluntarily reaching their own mutually acceptable settlement of issues in dispute.”

Successful mediations result in a signed agreement or contract which prescribes the future behaviour of the parties; this is often called a memorandum of understanding. Such an agreement has the force of a contract and, when signed, becomes binding.

3.2 Characteristics of a Mediation

Mediation is:

- **Voluntary:** No party is forced to use a mediator, nor are they forced to agree to a particular settlement.
- **Non-Coercive:** The mediator does not decide for the parties, but helps them make their own decision.
- **Assisted Negotiation:** The mediator’s role is to be an impartial third party who helps the parties reach a fair and mutually acceptable settlement. The mediator may provide relationship-building and procedural assistance. Moreover, the mediator may also provide substantive options to the parties.
- **Informal:** The proceedings of a mediation are more relaxed and informal than those of a court or an arbitration. There are no prescribed rules of procedure and few rules other than those agreed to by the parties themselves.
- **Confidential:** Generally, mediation is described as a confidential process. It is up to the parties to jointly establish any limits. If it is decided that the mediation should be confidential, the parties and the mediator should sign a clause to that effect. Notwithstanding a confidentiality clause, when a board of education is a party, the *Freedom of Information and Protection of Privacy Act* (British Columbia) must be examined to determine the extent to which a board of education may restrict disclosure and withholding of information.

3.3 How to Use Mediation

(a) Objective of a Mediation

Conducted properly, mediation can allow all parties involved to move away from legal concepts such as fault and instead, allow for a sharing of people’s perceptions and experiences and a determination of each party’s actual needs and interests. Such an outcome can often do more to truly resolve the problems or perceived problems which led to the dispute than any formal hearing.

During a mediation, both the parties and the mediator have certain responsibilities. The parties must attend, as requested, all mediation sessions and participate in the process in good faith. The mediator should remain dispassionate and avoid becoming partial to one party or view. Further, if expressly agreed, all statements and disclosures made and information and documents provided to the mediator are confidential, subject to application of the *Freedom of Information and Protection of Privacy Act* (British Columbia).

(b) *Preparing for a Mediation*

- The choice to go to mediation rests with the parties, all of whom must agree to attend.
- The parties must mutually select a mediator, either through referrals or directly.
- The mediation agreement should be drafted, laying out a number of critical items, including, but not limited to:
 - the logistics of the mediation;
 - the cost-sharing arrangement (normally 50/50);
 - the mandate of the mediator;
 - whether the mediation will be confidential or of public record;
 - how disclosure would operate -- in advance or as required by mediator;
 - the use of subsequent processes if mediation is unsuccessful; and
 - remuneration for the mediator.

(c) *Steps of a Mediation*

Although the actual mediation process may vary depending on the degree to which positions have hardened, the personalities of the people involved and the complexity of the issues, at root, all successful mediations involve a series of five mandatory tasks:

- agreeing to mediate;
- understanding the problem(s);
- generating options;
- reaching agreement; and
- implementing the agreement.

(d) *What is the Role of a Mediator?*

The role of the mediator varies depending on the personalities of the people involved, mandate given to the mediator by the parties, and the degree of emotions present at the mediation. This results in a spectrum ranging from a mediator who is completely neutral and value-free; to a mediator who takes a more active role in shaping the eventual outcome. The latter borders on mediator as advisor. Regardless of what techniques are used by the mediator to assist the parties in reaching a solution, the mediator is not empowered to render a decision.

In various situations, the mediator may attempt to:

- encourage exchanges of information;
- help the parties understand each other's views;
- let the parties know that their concerns are understood;
- promote a productive level of emotional expression;
- lay out the differences in perceptions and interests;
- identify and narrow issues;
- help parties realistically evaluate alternatives to settlement;
- suggest that the parties take breaks when negotiations reach an impasse;
- encourage flexibility and creativity;
- shift the focus from past to future;
- shift the focus from one of blame to a creative exchange between the parties;
- hold caucuses with each disputant if there is deadlock or a problem; and
- propose solutions that meet the fundamental interests of all parties.

3.4 *Concerns about Mediation*

- Some people believe that mediation should be mandatory, while others believe that to do so would introduce a coercive element which is counter-productive and contrary to the consensual spirit of mediation.
- As in many other processes, there is concern about accountability and authority to settle. A board of education is a public body and ultimately any settlement should be approved by the trustees.
- A concern that third parties may have, is that a board of education might use its very structure (with approvals required from trustees) to avoid making a final decision -- thus lengthening the mediation process and placing a mediated solution at risk.
- Although most mediations require that the disputing parties bear the costs of mediation equally, in some instances parties may agree to an uneven split of costs. However, this raises a concern that, by so doing, the party which is paying less would be less committed to the mediation process.

3.5 *Advantages of Mediation*

- Mediation is particularly useful when the disputing parties need or desire to maintain an ongoing relationship. The consensual process in mediation allows parties to avoid the

adversarial elements of litigation which often make it impossible to continue a productive relationship after the settlement.

- Mediation is a creative approach to dispute resolution which is not governed by strict rules of procedure. This allows the parties to design a process which suits their needs and encourages a consensual, rather than an adversarial approach.
- The presence of a mediator allows disputants to explore settlement options openly thereby allowing the mediator to become privy to both the interests and positions of the parties.
- Mediation is particularly advantageous in complex cases which involve numerous issues. Because of the flexibility of the process, the mediator can suggest compromise settlements on different issues, thus allowing for various settlement options which are not limited to legal remedies.
- Since mediations are almost invariably private, subject to the application of the *Freedom of Information and Protection of Privacy Act* (British Columbia), the process is appropriate if confidentiality is considered necessary.
- In general, a mediated settlement can be reached far quicker than a litigated one; accordingly, if the time to settle is short and prospects for settlement are reasonable, mediation can be the more appropriate process. Furthermore, the final outcome will likely meet both parties' needs and interests better because they will be the ones who define the terms of the final agreement.
- Similarly, due to the speed and informality of a mediation, the costs are generally considerably less than litigation. This is of importance both to parties who wish to keep costs down and to parties who otherwise might not be able to afford the cost of the court process.
- The presence of the third-party neutral allows for a controlled dialogue which is useful if previous negotiations have broken down or if the issue being mediated sparks strong emotions.
- It is a general rule that the costs of mediation will be borne equally by all parties. Therefore, both parties have an equal stake in the outcome and a sense of ownership.

3.6 *Disadvantages of Mediation*

- Due to its private, non-adjudicative nature, mediation cannot produce legal precedents.
- A strong-willed mediator can exercise too much control over the mediation and affect the eventual resolution.
- The lack of a binding third-party decision, might encourage a defendant to agree to a mediation, but not fully cooperate, in an attempt to delay a resolution of the dispute.

4. Arbitration

4.1 What is Arbitration?

Arbitration is perhaps the most popular and widely known dispute resolution process. Like litigation, arbitration utilizes an adversarial approach that requires a neutral party to render a decision.

Historically, arbitration has been used most widely in commercial disputes as a private alternative to litigation. Arbitration developed as a binding, adjudicative process. While these features closely parallel those of traditional court proceedings, there are important distinctions between the two processes.

In British Columbia, arbitration is regulated by the *Arbitration Act* (British Columbia), which provides a basic procedural framework for commercial arbitration. While arbitration was by its very nature developed as a binding process, it can also be non-binding. It is generally voluntary and parties normally can only be involved in an arbitration if they have agreed to be bound by that process.

Arbitration agreements can take many forms. The *Arbitration Act* (British Columbia) defines an arbitration agreement to include an arbitration clause in a contract or a separate agreement. However, an arbitration agreement does not need to be in writing.

Unlike litigation, arbitration generally allows the parties to design most aspects of the resolution process to suit their needs and the nature of the dispute. Further, the parties to an arbitration are able to choose the arbitrator, an option which is not available in the traditional court system. The *Arbitration Act* (British Columbia) is drafted in a way that offers a significant level of control to be maintained by the parties, for many of the procedural provisions contained in it are not mandatory, but rather are able to be displaced by agreement of the parties. Further, the *Arbitration Act* (British Columbia) provides only a framework for arbitration, lacking many of the procedural details that parties to an arbitration would want to clarify in an arbitration agreement.

4.2 Characteristics of Arbitration

Arbitration is:

- **Voluntary:** Parties must expressly agree to arbitrate in writing, or fall within the ambit of legislation that mandates arbitration in a given situation. If the parties have agreed to arbitrate, the court, on the motion of one of the parties to the agreement, will generally require the parties to submit the dispute to arbitration, unless it is found that the arbitration agreement is null and void, inoperative or incapable of being performed.
- **Controlled:** The parties and their counsel are able to control procedural aspects of the process, including the choice of neutral, timing and location of the hearing, as well as who, other than the parties themselves, may be present.
- **Private:** An arbitration is usually conducted in private.
- **Informal:** Subject to the *Arbitration Act* (British Columbia), there are no prescribed procedural or evidentiary rules governing an arbitration. The rules of procedure are established by the

adoption of existing rules, by a negotiated arbitration agreement between the parties, or by the parties and the arbitrator.

- **Adjudicative:** As in litigation, once a case has been presented by each side, the arbitrator issues a decision
- **Confidential:** Arbitration is generally confidential, if the parties so elect.
- **Adversarial:** While the arbitration process is based on the adversarial style of the litigation model, the demeanour and nature of the hearing are determined by the parties, their counsel and the arbitrator.
- **Flexible:** The parties have discretion in choosing an arbitrator and the procedure to be followed in resolving the dispute.

4.3 *Why use Arbitration?*

The dispute resolution process that best suits a particular case can only be determined upon an analysis of the dispute itself and the needs and interests of the parties. What does arbitration provide that litigation and the other dispute resolution processes do not?

(a) Speed

One of the main advantages of arbitration is its capacity to have disputes resolved quickly. Even though the majority of court actions settle before trial, this often occurs only after lengthy and expensive trial preparation, including examinations for discovery. Arbitration may provide the opportunity to side-step prescribed procedural requirements of litigation. The parties also determine the timeframe for the arbitration, allowing them to bypass delays inherent in litigation.

(b) Choice of Arbitrator

Arbitration provides the disputants with the opportunity to choose the individual(s) who will decide the issues in question. This freedom allows the parties to customize the resolution process to suit these issues by, for example, choosing an arbitrator with expertise in the subject matter of the dispute.

(c) Technical Issues

Many may be technical in nature. Resolution of these disputes is often best served by special knowledge or expertise on the part of the decision maker. Very often, judges do not have such expertise, and they must rely on expert witness evidence. Arbitration gives the parties an opportunity to secure the services of an individual experienced in a technical area, or one who has knowledge of the commercial norms relevant to a particular business field. It is for this reason that disputes in the construction industry are often resolved through arbitration.

4.4 *Advantages of Arbitration*

- The parties can select the arbitrator(s);

- Arbitrator(s) can be selected on the basis of experience relevant to the issues;
- The proceedings can be held in private and confidentiality may be preserved, subject to the *Freedom of Information and Protection of Privacy Act* (British Columbia);
- The rules of procedure can be as formal or informal as the parties and their counsel determine, subject to any statutory requirements, such as those imposed by the *Arbitration Act* (British Columbia);
- The cost of the proceedings can often be more easily contained;
- Due to increased control of the process there can be a greater opportunity for settlement; and
- Arbitral awards are final and binding under the *Arbitration Act* (British Columbia).

4.5 *Disadvantages of Arbitration*

- The success of arbitration is largely dependent on the experience of the arbitrator(s);
- Arbitral awards are not of legal precedential value;
- Recourse against an award is very limited;
- May not suit disputes involving matters of public law, such as constitutional issues;
- Time and cost can be significantly affected by a lack of co-operation of the parties or poor process design, or by lack of availability of an arbitrator(s).

4.6 *Should Arbitration Clauses be Incorporated into Board of Education contracts?*

The resolution process that will likely be the most effective for a particular dispute will be determined through the analysis of many factors, including: the nature of the issues, willingness of the parties to settle, precedential value of a final disposition and public interest concerns. It is therefore difficult to properly predetermine whether an arbitration clause should be included in a given contract. Each case must be assessed on its merits.

The preferred approach is to build flexibility into contracts. To accomplish this, the multi-step approach is one approach that has been developed. This approach requires the disputants to try several consensual, collaborative processes (such as negotiation and mediation) before arbitration.

4.7 *The Arbitration Process*

Arbitration occurs in one of three situations: where an arbitration agreement exists in a contract out of which a particular dispute arises; where disputing parties agree to arbitrate a dispute even though no prior arbitration agreement exists; and where a statute imposes an obligation to arbitrate.

Arbitration clauses found in contracts often lack sufficient procedural detail. This is due to the practical reality that arbitration agreements are very often negotiated as an “add on” at the conclusion of

contract negotiations, and further because it is often impossible to foresee the necessary procedural details required for a particular arbitration until the dispute arises. Once it has been decided that the parties will be proceeding by arbitration and a notice of intent to arbitrate has been served, it may be necessary for counsel to attempt to negotiate additional terms to supplement any original arbitration agreement. The amendments should normally cover the basic procedural steps while leaving the parties sufficient flexibility to make the process work for them.

There are essentially two strategies available when setting up an arbitration. The first involves the negotiation of an agreement at the time of contracting that includes most of the procedural detail required for the arbitration. The second leaves much of the procedural detail to the discretion of the arbitrator and the parties once the dispute has arisen.